

November 10, 2005

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2005-16 is available for public comments under this procedure. It was requested by counsel, Marc E. Elias and Brian G. Svoboda, on behalf of Fired Up! LLC

Proposed Advisory Opinion 2005-16 is scheduled to be on the Commission's agenda for its public meeting of Thursday, November 17, 2005.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on November 16, 2005.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2005-16, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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SECTION
COMMISSION
SECRETARIAT

2005 NOV 10 P 2:35

November 10, 2005

MEMORANDUM

AGENDA ITEM
For Meeting of: 11-17-05

TO: The Commission

THROUGH: Robert J. Costa *RJC*
Acting Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

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Esa L. Sferra *ELS*
Attorney

Subject: Draft AO 2005-16

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 17, 2005.

Attachment

1 ADVISORY OPINION 2005-16

2

3

4 Marc E. Elias, Esq.

5 Brian G. Svoboda, Esq.

6 Perkins Coie LLP

7 607 Fourteenth Street, N.W.

8 Washington, D.C. 20005-2011

9

10 Dear Messrs. Elias and Svoboda:

11

12 We are responding to your advisory opinion request on behalf of Fired Up! LLC

13 (“Fired Up”), concerning the application of the Federal Election Campaign Act of 1971,

14 ~~as amended (the “Act”), and Commission regulations to certain Internet websites owned~~

15 and operated by Fired Up.

16 The Commission concludes that the costs Fired Up incurs in covering or carrying

17 news stories, commentary, or editorials on its websites are encompassed by the press

18 exception, and therefore do not constitute “expenditures” or “contributions” under the

19 Act and Commission regulations.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letters received

22 August 22, 2005, and September 13, 2005, and publicly available documents.

23 Fired Up is a for-profit limited liability company (“LLC”) that was formed under

24 the laws of the State of Missouri in March 2005. In documents filed with the Missouri

25 Department of Revenue and the Internal Revenue Service, Fired Up has classified itself

26 as a partnership, although it has not formally elected to be classified as a partnership

27 under Federal tax law.

28 In its Articles of Organization, Fired Up states that its purpose is “[t]o publish a

29 website and any other lawful purpose.” Articles of Organization (March 4, 2005). Fired

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1 Up hopes to establish and maintain a network of up to 15 State-specific websites in the
2 coming year, depending on available funding. Currently, Fired Up maintains three State-
3 specific websites (for Missouri, Maryland and Washington), and one website aimed at
4 national issues.¹ Access to Fired Up's websites is free and available to the public without
5 registration or subscription. Neither Fired Up nor any of its websites is owned or
6 controlled by any political party, political committee or candidate.

7 Fired Up's Missouri website states that Fired Up's mission "is to keep
8 Missourians informed and united in the fight for responsible government, strong
9 communities, and secure families." See "What is the Mission of Fired Up?"
10 <<http://www.firedupmissouri.com/whoweare>>. A founding member of Fired Up, former
11 U.S. Senator Jean Carnahan, urges readers of the Missouri website to "[t]hink of Fired
12 Up! as you would a local coffee shop--a place where we can exchange ideas, freely and
13 respectfully. But," she adds, "it is also a launching pad for community action that grows
14 out of our discussions and concerns." See "A Message From Jean Carnahan,"
15 <<http://www.firedupmissouri.com/jean>>.

16 Fired Up was founded by three individuals: Ms. Carnahan, Roy Temple, and
17 Scott Sorrell. According to biographical information on Fired Up's Missouri website,
18 Mr. Temple has served as the executive director of the Missouri Democratic Party and as
19 chief of staff both to Ms. Carnahan and to her late husband, former Governor Mel

¹ See <<http://www.firedupmissouri.com>>, <<http://www.firedupmaryland.com>>,
<<http://www.firedupwashington.com>>, and <<http://www.firedupamerica.com>>.

1 Carnahan.² Mr. Sorrell is a computer consultant and designer of POWERbase campaign
2 software.³

3 Fired Up does not have any employees, nor does it have an editorial board or
4 staff. It generates revenue through the sale of buttons, bumper stickers, and T-shirts. Its
5 only operating expenses are payments to Mr. Sorrell's firm for technological support.
6 You have not identified any expenses incurred by Fired Up in connection with the
7 content of its websites. Fired Up has yet to adopt an operating agreement to apportion
8 costs and revenues among its members, although you state that it expects in the future to
9 hire employees, incur additional operating expenses, and generate revenue through the
10 sale of advertising on its websites. Fired Up might also solicit funding from "various
11 benefactors and investors."

12 Mr. Temple provides most of the content on Fired Up's websites. This content,
13 which you describe as "unabashedly progressive," generally consists of commentary on,
14 quotes from, and summaries of, news articles appearing on other entities' websites, with
15 hyperlinks to the quoted and summarized articles. Fired Up does not have any written
16 agreements with these other entities regarding Fired Up's posting of quotes from, and
17 hyperlinks to, their websites.

18 You state that Fired Up conducts some "original news reporting." As examples,
19 you refer to two postings on Fired Up's Missouri website concerning House Majority
20 Leader Roy Blunt.⁴ Each of these postings includes a headline and an indication that it
21 was submitted by Mr. Temple. The postings are also specifically designated as

² See <<http://www.firedupmissouri.com/bio-roy>>.

³ See <<http://www.firedupmissouri.com/howeare>>.

⁴ See "DeLay gave Roy Blunt \$150,000," <<http://www.firedupmissouri.com/delayblunt>>, and "Former Blunt Aide Paid \$50,000 for Veto Insurance Effort," <<http://www.firedupmissouri.com/vetoinsurance>>.

1 "FiredUpMissouri.com Exclusive[s]." In this respect, they differ from the other postings
2 on Fired Up's websites, which typically only include user-created headlines and a
3 reference to the individuals who posted them. Consistent with this latter approach, Fired
4 Up's websites expressly provide that "the posts and comments [appearing on the
5 websites] are the views of the authors," rather than of Fired Up. *See, e.g.,*
6 <<http://www.firedupamerica.com>>.

7 You indicate that Mr. Temple exercises final editorial and formatting control over
8 the content of Fired Up's websites, and that he might edit content posted by registered
9 users, delete it, move it, or leave it alone. Although Mr. Temple is not compensated for
10 his services, Fired Up anticipates paying him as an employee once it generates sufficient
11 revenue.

12 In addition, you state that "other media outlets" have referred to postings on Fired
13 Up's websites. As an example, you cite a reference to a posting on Fired Up's national
14 website that appeared in The Blogometer,⁵ the National Journal's "daily report . . . taking
15 the temperature of the political blogosphere."⁶ You also refer to an article in *The St.*
16 *Louis Post Dispatch* that reported on a story "first disclosed on the FiredUpMissouri.com
17 Web site of Democratic activist Roy Temple."⁷

18 Any reader of a Fired Up website can post his or her own content directly onto the
19 website after using a free sign-in feature to become a "registered user" of the website.
20 Each registered user also receives a complimentary weblog on the website, and can post
21 comments directly on other registered users' weblogs and in response to content on the

⁵ See "Miscellany: This Would Be News, But, You Know . . .,"
<http://blogometer.nationaljournal.com/archives/2005/09/99_katrina_katr.html>.

⁶ <<http://blogometer.nationaljournal.com/>>.

⁷ See "Realtors' Lobbyist Has Close Ties To Governor's Father," *St. Louis Post-Dispatch*, July 12, 2005, p. A1.

1 main page of the website. The placement of all posts within the “popular content”
2 section of the main page of each website is determined, in part, by the popularity of each
3 post, based on the number of “hits” received from readers.

4 In addition to commenting on and summarizing articles appearing on other
5 entities’ websites and displaying content posted by registered users, the Fired Up
6 Missouri website features “guest editorials” by Ms. Carnahan and other individuals.
7 Each Fired Up website also contains calls to action, such as a posting by Mr. Temple that
8 urged readers to contact Wal-Mart’s chief executive officer in opposition to Wal-Mart’s
9 decision to sue an employee.⁸ Finally, each Fired Up website provides hyperlinked lists
10 of content on other Fired Up websites, weblogs featured on a “community blogroll,” and,
11 separate from its own headlines, a list of headlines from (and hyperlinks to) websites
12 maintained by CNN and *The Washington Post*.⁹

13 ***Question Presented***

14 *Is Fired Up eligible for the press exception?*

15 ***Legal Analysis and Conclusion***

16 The Commission concludes that, in light of the facts presented, Fired Up’s
17 disbursements for news stories, commentary, and editorials on its websites are
18 encompassed by the press exception, and therefore do not constitute “expenditures” or
19 “contributions” under the Act and Commission regulations.

20

⁸ See “Wal Mart’s Shameful Lawsuit,” <<http://www.firedupamerica.com/shankwalmart>>.

⁹ Fired Up does not have any written agreements with either CNN or *The Washington Post* regarding these hyperlinks.

1 ***Press Exception***

2 The Act and Commission regulations define the terms “contribution” and
3 “expenditure” to include any gift of money or “anything of value” for the purpose of
4 influencing a Federal election. *See* 2 U.S.C. 431(8)(A) and (9)(A); 11 CFR 100.52(a)
5 and 100.111(a). However, there is an exception for “any cost incurred in covering or
6 carrying a news story, commentary, or editorial by any broadcasting station (including a
7 cable television operator, programmer or producer), newspaper, magazine, or other
8 periodical publication . . . unless the facility is owned or controlled by any political party,
9 political committee, or candidate[.]” 11 CFR 100.73, 100.132; *see also* 2 U.S.C.
10 431(9)(B)(i). This exclusion is known as the “press exception.”

11 The Commission has applied a two-step analysis to determine whether the press
12 exception applies. First, the Commission asks whether the entity engaging in the activity
13 is a press entity as described by the Act and Commission regulations. *See, e.g.,* Advisory
14 Opinions 2004-07, 2003-34, 2000-13, 1998-17, 1996-48, 1996-41, and 1996-16. Second,
15 in determining the scope of the exception, the Commission considers: (1) whether the
16 press entity is owned or controlled by a political party, political committee, or candidate;
17 and (2) whether the press entity is acting as a press entity in conducting the activity at
18 issue (*i.e.*, whether the entity is acting in its “legitimate press function”). *See Reader's*
19 *Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips*
20 *Publishing*, 517 F. Supp. 1308, 1312-1313 (D.D.C. 1981); Advisory Opinions 2004-07,
21 2000-13, 1996-48, and 1982-44. Two considerations in applying this analysis include
22 whether the entity’s materials are available to the general public and are comparable in
23 form to those ordinarily issued by the entity. *See Federal Election Commission v.*

1 *Massachusetts Citizens for Life*, 479 U.S. 238, 251 (1986); Advisory Opinion 2000-13
2 (concluding that a website covered by the press exception was “viewable by the general
3 public and akin to a periodical or news program distributed to the general public.”)

4 **1. Press Entity Status**

5 Fired Up qualifies as a press entity. Its websites are both available to the general
6 public and are the online equivalent of a newspaper, magazine, or other periodical
7 publication as described in the Act and Commission regulations.

8 An examination of Fired Up’s websites reveals that a primary function of the
9 websites is to provide news and information to readers through Fired Up’s commentary
10 on, quotes from, summaries of, and hyperlinks to news articles appearing on other
11 entities’ websites and through Fired Up’s original reporting. Fired Up retains editorial
12 control over the content displayed on its websites, much as newspaper or magazine
13 editors determine which news stories, commentaries, and editorials appear in their own
14 publications. Roy Temple, acting on behalf of Fired Up, not only produces much of the
15 content but also exercises day-to-day control over which stories are featured. Reader
16 comments appearing on Fired Up’s websites are similar to letters to the editor and do not
17 alter the basic function of Fired Up. *See* Advisory Opinion 1996-16 (the “use of
18 audiences composed of non-reporters, and subscribers and guests at computer terminals,
19 does not alter the basic nature” of Bloomberg LLP’s electronic town meeting featuring
20 presidential candidates with a moderator, a set format, and a time limit.)

21 According to the House report on the 1974 amendments to the Act, the press
22 exception made plain Congress’s intent that the Act would not “limit or burden in any
23 way the first amendment freedoms of the press ...” and would assure “the unfettered right

1 of the newspapers, TV networks, *and other media* to cover and comment on political
2 campaigns.” *H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4* (1974) (emphasis added).
3 Consistent with this intent, the Commission has already expressly extended the press
4 exception to qualified activities that appear on the Internet. For instance, in Advisory
5 Opinion 2000-13 the Commission found that iNEXTV, a company operating a network
6 of specialized news and information websites with limited original content, qualified for
7 the press exception through its Internet activities even though it lacked a traditional
8 “offline” media presence. The Commission concluded that iNEXTV and its EXBT
9 website were press entities “both as to their purpose and function.” Advisory Opinion
10 2000-13. The Commission characterized the network of news and information websites
11 operated by iNEXTV as “webcast video periodicals.” *Id.* In finding EXBT to be a
12 press entity, the Commission noted the “news function” that EXBT provided through
13 direct access to news and commentary. The Commission concluded that the website was
14 “viewable by the general public and akin to a periodical or news program distributed to
15 the general public.” *Id.*¹⁰ The Commission reaches the same conclusion here with
16 respect to the Fired Up websites described in your request. Thus, Fired Up is a press
17 entity and satisfies the first step of the press exception test.

18 2. Ownership Criteria and Legitimate Press Function

19 Fired Up is a for-profit LLC¹¹ and is not owned or controlled by any political
20 party, political committee, or candidate. Given that Fired Up’s operation of its websites
21 is at the core of its activities as a press entity, its provision of news stories, commentary,

¹⁰ See also Advisory Opinion 2004-07 (MTV’s website promotion of “Prelection” and contemporaneous posting of candidate materials on MTV website entitled to the press exception) and Advisory Opinion 2003-34 (depiction of Federal candidates on Viacom and Showtime websites entitled to the press exception).

¹¹ For-profit status is not essential to a determination that an entity qualifies for the press exception.

1 and editorials on its websites falls within Fired Up's legitimate press function.¹² Thus,
2 because Fired Up is a press entity, and neither it nor its websites are owned or controlled
3 by any political party, political committee, or candidate, the costs Fired Up incurs in
4 covering or carrying a news story, commentary, or editorial on its websites are exempt
5 from the definitions of "contribution" and "expenditure." The Commission notes that an
6 entity otherwise eligible for the press exception would not lose its eligibility merely
7 because of a lack of objectivity in a news story, commentary, or editorial, even if the
8 news story, commentary, or editorial expressly advocates the election or defeat of a
9 clearly identified candidate for Federal office. *See* First General Counsel's Report, MUR
10 5440 (CBS Broadcasting, Inc.) ("Even seemingly biased stories or commentary by a
11 press entity can fall within the media exemption.")

12 The Commission expresses no opinion regarding the application of State law or
13 the Internal Revenue Code to the proposed activities because those questions are not
14 within the Commission's jurisdiction.

15 This response constitutes an advisory opinion concerning the application of the
16 Act and Commission regulations to the specific transaction or activity set forth in your
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
18 of the facts or assumptions presented, and such facts or assumptions are material to a
19

¹² You do not ask, and the Commission does not address, whether any other activities Fired Up may wish to conduct, whether on the Internet or not, would be within the scope of Fired Up's press function. *See, e.g.,* Advisory Opinion 2004-07 (MTV's provision of election-related educational materials at community events does not qualify as a press function because this activity is not one typically performed by a press entity).

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity.

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Sincerely,

Scott E. Thomas
Chairman

12 Enclosures: Advisory Opinions 2004-07, 2003-34, 2000-13, 1998-17, 1996-48, 1996-41,
13 1996-16 and 1982-44.